***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

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# Court of Appeals, District of Columbia

**APRIL TERM, 1910.**

**No. 2123.** 711

JAMES L. PARSONS, APPELLANT,

*vs.*

THE DISTRICT OF COLUMBIA.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA**

**FILED FEBRUARY 16, 1910.**

# COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

**APRIL TERM, 1910.**

## No. 2123.

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JAMES L. PARSONS, APPELLANT,

*vs.*

THE DISTRICT OF COLUMBIA, APPELLEE.

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**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA**

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 3, 1910.

# In the Court of Appeals of the District of Columbia.

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No. 2123.

JAMES L. PARSONS, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

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a Supreme Court of the District of Columbia.

No. 51139. At Law.

JAMES L. PARSONS, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Amended Declaration, &c.*

Filed January 4, 1910.

In the Supreme Court of the District of Columbia.

No. 51139. At Law.

JAMES L. PARSONS, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant.

The plaintiff, James L. Parsons, by leave of the Court first had and obtained, files this, his amended Declaration, as follows:

The plaintiff, James L. Parsons, sues the defendant, the District of Columbia, a municipal corporation, for money payable by the defendant to the plaintiff, for that on, to wit, the 29th day of July, A. D., 1905, the plaintiff entered into a contract with Leslie M. Shaw, then Secretary of the Treasury, and Henry B. F. Mcfarland, Henry L. West and John Biddle, then Commissioners of the Dis-

trict of Columbia, acting jointly under the name of the "Municipal Building Commission" professedly for and on behalf of the United States and the District of Columbia, but really for and on behalf of the District of Columbia, the said Commission professing to act by virtue of an act of Congress entitled, "An act to increase the limit of cost of certain buildings; to authorize the purchase of sites for public buildings, to authorize the erection and completion of public
2 buildings and for other purposes," approved June 6, 1902; whereby for the consideration of Eight hundred and fifty-four thousand, three hundred dollars ($854,300.) the plaintiff agreed to furnish all the labor and materials, except the foundation, which had already been put in, and the face, or cut stone, which was to be furnished or caused to be furnished, by the District of Columbia, acting through the said Municipal Building Commission, and to erect and finally complete on or before November 1, 1907, a building for the use and accommodation of the Municipal Offices of the District of Columbia, according to certain plans and specifications annexed to said contract, on a lot or square, (to wit, square numbered 255) in the City of Washington, in the District of Columbia, belonging to the District of Columbia, and as to which lot or square the United States had no title nor interest in regard to the same, except to see to the application of money appropriated by the Congress of the United States, to pay for the erection of said building.

And plaintiff says that by the terms of said contract he was to be paid the said sum of $854,300, in monthly installments, based on estimates, approved by the Supervisor of Construction named in said contract, as work on said building progressed, less ten per cent of said contract price, which was not to be paid until after said building was finally completed and accepted by said District of Columbia, acting through said Municipal Building Commission, and plaintiff further says that the District of Columbia, acting through said Municipal Building Commission, agreed to
3 furnish, or cause to be furnished to the plaintiff all the face or cut stone required by said building, within sixteen months from April 12, 1905, the same to be delivered at the site of said building as follows:

All stone for basement and sub-basement stories in four months; all stone for first story in six months; all stone for second story in eight months; all stone for fourth story within thirteen months; and all remaining stone within sixteen months; and that the District of Columbia, acting through said Municipal Building Commission, would promptly deliver, or cause to be delivered to the plaintiff the said face or cut stone as above stipulated; and in the order required by said building he entered upon the performance of said work and prosecuted the same diligently and finally completed the same on or about the First day of July, 1908, and the same is now being used for its Municipal and other offices, by the said District of Columbia.

And the plaintiff further avers that the aforesaid District of Columbia, acting through said Municipal Building Commission, in breach of its said contract made as aforesaid, failed and neglected to furnish, or cause to be furnished to him the face or cut stone required for said building within the times stipulated in said contract, and in

the order the same was required for use in said building, whereby and by reason thereof the plaintiff was greatly obstructed, hindered and delayed in the execution of said work for a long time, to wit, for a period of twelve months, and was thereby subjected to
4 extra expense, loss and damage, for wages of men employed in extra handling and storing of building material intended for use in said building during said period of delay; for wages of stone-setters, who had to be retained in plaintiff's employ and paid pending the delivery of said stone, during said period of delay; for salaries of clerks and office expenses during said period of delay; for extra salaries of watchmen employed during said period of delay; for extra salary of Superintendent during said period of delay; for loss of interest on value the plaintiff's building equipment that was kept standing idle during said period of delay; and for the plaintiff's personal supervision of said building during said period of delay, to the damage and injury of the plaintiff in the sum of Fifteen Thousand ($15000.00) Dollars.

And the plaintiff therefore brings this suit and claims under this Count the sum of Fifteen Thousand ($15000.00) Dollars damages, besides costs, according to the particulars of demand hereto annexed.

Second Count: And the plaintiff sues the defendant for other money payable by the defendant to the plaintiff for that, the plaintiff and Leslie M. Shaw, then Secretary of the Treasury, and Henry B. F. Mcfarland, Henry L. West and John Biddle, then Commissioners of the District of Columbia, styling themselves the "Municipal Building Commission," but in fact acting for and on behalf of the defendant, the District of Columbia only, although professing to act on behalf of both the United States and the said District of Columbia, by their certain writing under seal, which is now
5 shown to the Court, the date whereof is July 29, A. D., 1905, did mutually covenant, promise and agree together as follows:

That for and in consideration of the sum of $854,300, the plaintiff would furnish all the labor and materials, except the foundation, which had already been put in, and the face or cut stone, which was to be furnished, or caused to be furnished by the said District of Columbia, acting through said Municipal Building Commission, and erect and finally complete, on or before November 1, 1907, a building for the use and accommodation of the Municipal Offices of the District of Columbia, according to certain plans and specifications annexed to said contract, on a lot or square of ground in the District of Columbia, (to wit, square 255) in Washington City belonging to the District of Columbia, and as to which lot the United States had no title nor interest in regard to same except to see to the application of money appropriated by the Congress of the United States to pay for the erection of said building. And the plaintiff says that by the terms of said contract he was to be paid said sum of $854,300, in monthly installments, based on estimates, approved by the Supervisor of Construction, as work on said building progressed, less ten per cent of said contract price, which was not to be paid until after said building was finally completed and accepted by said District of Columbia, acting through said Municipal Building

Commission; and plaintiff further says that said District of Columbia,
6 acting through said Municipal Building Commission, agreed to furnish or cause to be furnished to the plaintiff all the face or cut stone required for said building, within sixteen months from April 12, 1905, the same to be delivered at the site of said building as follows:

All stone for basement and sub-basement stories, in four months; all stone for first story in six months; all stone for second story in eight months; all stone for fourth story within thirteen months; and all remaining stone within sixteen months; and the plaintiff says that on the faith that said District of Columbia, acting through said Municipal Building Commission, would promptly deliver, or cause to be delivered to him the said face or cut stone as above stipulated and in the order required for said building, he entered upon the performance of said work and prosecuted the same diligently and finally completed the same on or about the First day of July, 1908, and the same is now being used for its Municipal and other offices by the said District of Columbia.

And the plaintiff further avers that the aforesaid District of Columbia, acting through said Municipal Building Commission, in breach of said contract, failed and neglected to furnish or cause to be furnished to him the face or cut stone required for said building within the times stipulated in said contract and in the order the same was required for use in said building, whereby, and by reason thereof, the plaintiff was greatly obstructed, hindered and delayed in the execution of said work for a long time, to wit, for a period of
7 twelve months; and was therefore subjected to extra expense, loss and damage, for wages of men employed, in extra handling and storing of building material intended for use in said building during said period of delay; for wages of stone-setters who had to be retained in plaintiff's employ and paid pending the delivery of said stone during said period of delay; for salaries of clerks and office expenses during said period of delay; for extra salaries of watchmen employed during said period of said delay; for extra salary of Superintendent during said period of delay; for loss of interest on value of the plaintiff's building equipment standing idle during said period of delay; and for the plaintiff's personal supervision of said building during said period of delay, to the damage and injury of the plaintiff in the sum of Fifteen Thousand ($15000.00) Dollars.

And the plaintiff therefore brings this suit and claims under this Count the sum of Fifteen Thousand ($15000.00) Dollars damages, besides costs, according to the particulars of demand hereto annexed.

S. T. THOMAS,
JOHN RIDOUT,
*Attorneys for Plaintiff.*

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise, judgment.

S. T. THOMAS,
JOHN RIDOUT,
*Attorneys for Plaintiff.*

8 The District of Columbia to James L. Parsons, Dr.,
Builder,
616 Union Trust Building.

*Bill of Particulars.*

(Copy.)

To damages on account of delays in deliveries of cut stone for New Municipal Building, as follows:

| | |
|---|---|
| To extra salary of superintendent, 32 weeks at $50.00 per week | $1600.00 |
| To extra salary of foreman bricklayer, 32 weeks at $42.00 per week | 1344.00 |
| To extra salary of foreman stonecutter, 32 weeks at $36.00 per week | 1152.00 |
| To extra salary of material clerk, 32 weeks at $18.00 per week | 576.00 |
| To extra salary of day watchman, 32 weeks at $11.00 per week | 352.00 |
| To extra salary of night watchman, 32 weeks at $10.00 per week | 320.00 |
| To extra salary of office boy, 32 weeks at $5.00 per week | 160.00 |
| 9 To extra salary of private secretary, 32 weeks at $15.00 per week | 480.00 |
| To 5% interest on plant for 32 weeks (Value of plant $20,000.00) | 666.00 |
| To extra premium on bond (to cover extension) | 1044.40 |
| To extra handling of 1000 tons steel at $1.00 | 1000.00 |
| To cash paid to District for engineer's salary operating heating apparatus | 400.00 |
| To extra handling of granite, balustrades, exterior steps, and marble delivered out of order required for building | 905.60 |
| To extra personal supervision of said building during the period of delay | 5000.00 |
| | $15000.00 |

*Demurrer to Amended Declaration.*

Filed January 11, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 51139.

JAMES L. PARSONS
vs.
THE DISTRICT OF COLUMBIA.

The defendant says that the amended declaration, filed
10 herein, is bad in substance.

E. H. THOMAS,
*Corporation Counsel, for Defendant.*

NOTE.—Among the points to be argued are:

1. The only contract sued upon is one between the United States and the plaintiff, to which the District of Columbia is not a party.

2. If the contract sued upon be one between the plaintiff on the one part and the United States and the District of Columbia acting jointly as party of the other part, the United States has not been joined in the suit as a party and the District of Columbia cannot be sued alone.

3. There is no authority in law for the District of Columbia to enter into any such contract either alone or in conjunction with the United States, and if the contract be such a one it is void in law.

4. The District of Columbia had no authority to act as alleged, or otherwise, through such Building Commission nor to do any act relating to the construction of the Municipal Building.

11 Supreme Court of the District of Columbia.

FRIDAY, *January* 14*th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

No. 51139. At Law.

JAMES L. PARSONS, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant.

Upon consideration of the demurrer filed herein January 11th, 1910, to the amended declaration filed herein, it is ordered that said demurrer be, and the same is hereby sustained. Whereupon, the plaintiff electing by his attorneys in open court, to stand upon the pleadings now on file in this cause, it is ordered that said cause be, and the same is hereby dismissed. Wherefore, it is considered, that the plaintiff herein take nothing by this action, that the defendant go hereof without day be for nothing held and recover of plaintiff its costs of defense to be taxed by the clerk, and have execution thereof.

Therefore, the plaintiff in open court, notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of a bond to operate as a supersedeas, is hereby fixed in the sum of One Hundred Dollars.

12 *Memorandum.*

January 18, 1910.—Appeal bond approved and filed.

*Directions to Clerk for Preparation of Transcript of Record.*

Filed January 18, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 51139.

JAMES L. PARSONS
vs.
DISTRICT OF COLUMBIA.

The Clerk of said Court will include in record on appeal the following proceedings:

Amended Decl. filed Jan'y 4, 1910.

Demurrer to amended decl. filed Jan'y 11, 1910.

Judgment on demurrer. Mem. of filing appeal bond. This designation.

S. T. THOMAS,
JOHN RIDOUT,
*Attorneys for Plaintiff.*



UNITED STATES OF AMERICA,
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 12, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51139 at Law, wherein James L. Parsons is Plaintiff and The District of Columbia is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 12th day of February, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2123. James L. Parsons, appellant, vs. The District of Columbia. Court of Appeals, District of Columbia. Filed Feb. 16, 1910. Henry W. Hodges, clerk.

# In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1910.

No. 2123.

JAMES L. PARSONS, APPELLANT,

*vs.*

THE DISTRICT OF COLUMBIA.

**Appeal from the Supreme Court of the District of Columbia.**

SIDNEY T. THOMAS,
JOHN RIDOUT,
*Attorneys for Appellant.*

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

# In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1910.

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No. 2123.

---

JAMES L. PARSONS, APPELLANT,

*vs.*

THE DISTRICT OF COLUMBIA.

---

**Appeal from the Supreme Court of the District of Columbia.**

---

## Statement of the Case.

In 1902 Congress authorized the purchase of square 255, in this city, and the erection thereon of a fire-proof building, for the accommodation of the *municipal and other offices in the District of Columbia;* one-half the cost thereof to be paid by the United States, and one-half by the District of Columbia; supervision of the construction of said building was to be under an officer of the Government, to be appointed by the President. In 1903, the cost of the building, including the site, was increased from $1,500,000 to $2,000,000; the site, which had then been acquired, granted *unreservedly* to the *District of Columbia,* and the Secretary of the *Treasury* and the District *Commissioners* were authorized, under the act of 1902, to contract, on behalf of the District of Columbia, for the erection and completion of the building.

On July 29, 1905, the plaintiff and the Secretary of the Treasury and the Commissioners of the District of Columbia, styling themselves "*The Municipal Building Commission,*" for and on behalf of the District of Columbia, entered into a contract for the erection and completion of said building for the price of $854,300, payable as the work progressed.

For this sum the plaintiff agreed to furnish all the material and labor, except the foundation already built and the cut or face stone which was to be furnished by the said *Municipai Building Commission,* acting for the District of Columbia.

The title to the land (square 255) on which the building was to be erected was in the District of Columbia *alone,* at the date of said contract, and the *United States had no interest therein other than the supervisory interest herein before referred to.*

The Secretary of the Treasury and the District Commissioners, designating themselves "*The Municipal Building Commission,*" acting for the District of Columbia, and under the supervision aforesaid, agreed to furnish all the face or cut stone, or cause it to be furnished, within *sixteen months* from April 12, 1905, at times fixed by its contract with the stone quarry company.

The Secretary of the Treasury and the District Commissioners, the so-called Municipal Building Commission, acting for the District of Columbia, failed from time to time to cause said stone to be furnished at the times agreed upon or in the order in which the same was to be used, whereby the plaintiff was delayed in the execution of the work for twelve months and was thereby subjected to extra expense and damage.

Such, briefly, being the facts, the plaintiff sued the defendant for breach of said contract to recover $15,000 damages alleged to have been sustained by him by reason of the delays of the defendant in causing the cut

stone necessary for the building to be furnished within sixteen months from April 12, 1905, and in the order required for the work.

The amended declaration, which superseded the original declaration, contained two counts, one in assumpsit and one in covenant.

The defendant demurred to the amended declaration. The court below sustained the demurrer, dismissed the action, and the plaintiff took this appeal.

## Assignments of Error.

The court below erred:

1. In sustaining the demurrer.

2. In holding that the District of Columbia could not be sued on the contract set forth in the declaration.

3. In holding that the Secretary of the Treasury and the District Commissioners, designating themselves "*The Municipal Building Commission*" were without authority to make a contract binding on the District of Columbia.

## Points and Authorities.

It may as well be stated at the outset that an inspection of the acts of Congress of June 6, 1902, and March 3, 1903, providing for the erection of a Municipal Building will show that the Secretary of the Treasury and the District Commissioners were *not* by those acts constituted a "*Municipal Building Commission.*" This would appear to be a designation adopted by those gentlemen for purposes of their own convenience, perhaps.

The only question which arises on this appeal is the construction of the two acts of Congress of June 6, 1902 (32 Statutes, pt. 1, page 321) and March 3, 1903 (32 Statutes, pt. 1, page 1206), providing for the purchase of land and the erection thereon of a building "*for the accommodation of the municipal and other offices of the District of Columbia.*"

The point raised by the demurrer that the contract was joint between the United States and the District of Columbia, and as the United States had not been sued, the action could not be maintained, was abandoned by counsel for the defendant in argument in the court below, as it must have been, in view of section 1205 of the District Code, which provides that a contract expressed to be joint may, for the purpose of a suit thereon, be treated as joint and several. And the case was argued by the learned counsel on the following propositions: *First*, that the District Commissioners had no power to purchase land and erect a building, and, *second*, that by virtue of the act of Congress of February 21, 1871, changing the form of the District government, the act of June 20, 1874, abolishing the Board of Public Works, and creating temporary Commissioners, and the act of June 11, 1878, providing the present form of government, the District Commissioners have been reduced to the level of "*merely administrative officers with ministerial powers only*," and are prohibited from making any contract for the payment of money in excess of $100, *not* reduced to writing and *recorded in a book*, to be kept for that purpose; and that since the contract for the erection of the new Municipal Building calls for the payment of *more* than $100, and was not *recorded in a book*, it is not binding on the District. And numerous cases in the Supreme Court and in this court were cited to support those two propositions.

Counsel for the appellant do not dispute the first proposition of defendant's counsel, and in the absence of the acts of Congress of June 6, 1902, and March 3, 1903, providing a Municipal Building for the District of Columbia, would be quite willing to concede the truth of his second proposition.

There was never any question in this case of the right or power of the District Commissioners, *generally*, to

purchase land and erect a building thereon; until counsel for the defendant raised it. What counsel for the appellant contend for is, that the acts of Congress of 1902, and 1903, providing for a Municipal Building, *when read together*, show by *plain and necessary inference* that the contract in question was entered into by the District of Columbia through the agency of the Secretary of the Treasury and the District Commissioners, styling themselves the "Municipal Building Commission," and that the same is binding on the District of Columbia.

**It is a necessary and plain inference from the legislation and the contract in this case that the Secretary of the Treasury and the District Commissioners, acting as the Municipal Building Commission, acted for and on behalf of the District of Columbia.**

United States contracts are invariably made through the agency of Cabinet officers or engineer officers of the Army or Navy.

The District Commissioners make contracts for the erection of school buildings, station houses, sewers, and street improvements on behalf of the District of Columbia.

In District of Columbia *vs.* Iron Works, 15 App. D. C., 198, a contract executed by the Commissioners under their hands, intended as and manifestly an official act, was held to have force and effect of a deed and binding on the District of Columbia and not the individual Commissioners.

In the States, counties exercise their powers in making contracts for public improvements through boards of county commissioners, or, in some jurisdictions, through supervisors and county courts. In such cases it is invariably held that the counties are bound on the contracts.

Montgomery County *vs.* Barker, 45 Ala., 237.
People *vs.* Pueblo County, 2 Colo., 360.
Benton County *vs.* Patrick, 54 Miss., 240.

Where a lease is executed on behalf of the State by a public officer duly authorized, and this fact appears on the face of the instrument, it was held the deed of the State.

Thus in Sheets *vs.* Selden's Lessee (2 Wall., 177) the lease was executed by Noble, acting canal commissioner, payment of rents not being made, Selden regarded the lease as forfeited, brought an action for possession of the premises and the defense among others was that the lease was not the lease of the State.

The Supreme Court, in affirming the judgment against the contention, speaking by Mr. Justice Field, said:

> "It may be stated generally that when a deed is executed, or a contract is made on behalf of the State, by a public officer duly authorized, *and this fact appears on the face of the instrument, it is the deed or contract of the State*, notwithstanding that the officer may be described as one of the parties, and may have affixed *his individual name and seal.* In such case the State alone is bound by the deed or contract and can alone claim its benefits."

Citing—

Stinchfield *vs.* Little, 1 Greenl. Rep., 231.
State *vs.* McCauley, 15 Cal., 429.

In Peake *vs.* United States, 16 App. D. C., 415, the question was whether reference in a bond given by a contractor for Government work, to a contract made with "Cornelius N. Bliss, Secretary of the Interior," was equivalent to a contract by the United States of America, acting in this behalf by "Cornelius N. Bliss, Secretary of the Interior," and it was held that it was.

Mr. Justice Morris, speaking for the court, says:

> "The bond purports to secure a contract executed by Baldwin & Peake, and by Cornelius N. Bliss, Secretary of the Interior, for the construction of certain buildings for the Government of

> the United States under the immediate charge of the Department of the Interior, which is the specific purpose of the contract entered into by the United States, acting through Cornelius N. Bliss, Secretary of the Interior; and while it would undoubtedly have been more accurate to have described the contract as having been made by the United States, through the agency of the Secretary of the Interior, than by the Secretary of the Interior, with the necessary inference that he was acting for the United States, yet there was no possibility of mistake in the matter, and no one was misled or prejudiced by the inaccuracy. Plainly, all parties understood that they were dealing with the United States, and not with Cornelius N. Bliss, as an individual; and there can be no reasonable question that the contract with 'Cornelius N. Bliss, Secretary of the Interior,' specified in the bond, sufficiently identifies the contract with the United States intended to be secured by the bond."

It is believed that an examination of the cases, against the United States, on contracts, in the Court of Claims, and on appeal from the Court of Claims to the Supreme Court of the United States, will show in every instance where there was a *written contract* that the same was executed by some officer, *acting* for the United States, or through the *agency* of some officer acting in that behalf. There was never any contention, either in the Court of Claims, or in the Supreme Court of the United States, that contracts thus executed, were not valid and binding upon the Government.

**The Admitted Defense in This Case Rests Upon an Entirely Erroneous Confusion of, and Misapplication of Certain Well Settled Principles.**

Take the relevant legislation as actually written, being the acts of 1902 and of 1903, and it will appear that the central thought, obscurely expressed, as is so often the

case, with legislation relating to the District of Columbia, is that the municipality was to have a *municipal building* for its home.

This appears from the fact that even in the initial legislation, the act of 1902, the joint use of the building by the District of Columbia and the United States is contemplated, and that while square 255 was to be acquired for the joint use of the United States and the District of Columbia it was to be used for the erection thereon of a *municipal building* for said District.

No doubt the reference to the joint acquisition was due to the fact that one-half of the cost was to be paid by the United States, and in furtherance of the legislation Congress ordered that certain surrounding streets be added to the area of the square for the purpose of "erecting thereon the Municipal Building" and for the actual cost of removing street railway tracks on streets so donated, jurisdiction was given to the Supreme Court of the District of Columbia to enter judgment jointly against the United States and the District of Columbia.

The act of 1902 further provides that when the land has been acquired the *Secretary of the Treasury*, and the then *Commissioners* of the District of Columbia (*not the Municipal Building Commission*)shall proceed at once to contract for the erection of a fire-proof building for the accommodation of the *municipal and other offices* of the District of Columbia, one-half the cost to be paid by the United States and one-half by the District of Columbia.

The act of 1903 speaks of the *Municipal Building, Washington, District of Columbia,* and increases the appropriation to $2,000,000 for the land and for the building, one-half to be paid by the United States and one-half by the District of Columbia, and the very next sentence grants the site *unreservedly to the District of Columbia.* The proviso so much dwelt upon by the defend-

ant's counsel in the court below simply preserves the right of the Secretary of the Treasury to supervise the erection, it expressly states that he and the Commissioners shall, acting jointly, contract for erecting and completing a building for the accommodation of the municipal and other offices in the District of Columbia.

It is submitted, upon a fair view of the legislation of 1902 and 1903, that it contemplated a building for the *District* of *Columbia* and not for the United States, and that the only effect of the joint action of the Secretary of the Treasury and the District Commissioners was that as the United States was to pay one-half the cost its own officer should take part in supervising that large expenditure; and here it may be further noted that whatever recovery is had in this case will be paid in precisely the same proportions as is prescribed in the legislation referred to, namely, one-half by the District of Columbia and one-half by the United States.

There are numerous cases which hold that where a corporation, by an admittedly *ultra vires* act (which is not admitted in this case) obtains property, it can not successfully invoke the defense of *ultra vires* and retain the property, and that these cases are based upon the soundest reason and principles of natural justice.

So that even if it should be admitted, which it is not, that a municipal corporation has not the inherent power to acquire a site for and erect thereon a municipal home, thus relieving itself of great expense for rent and the greater inconvenience of a transitory habitation, yet it is liable, if in the exercise of claimed authority, and acting by its executive officers, under the supervision of the representative of the United States, the contributor of one-half of the cost, it has obtained a building, taken possession of it and remains in possession of it; and if it refuses to pay for it, then, logically, if the District of

Columbia is not liable under the admission of the demurrer, the one-half of the cost of the building, so far as paid by the District of Columbia and amounting to upwards of half a million dollars, was an unlawful payment, and if the contention is sustained it will be the plain duty of the public accounting officers and the proper officers of the United States to bankrupt the then disbursing officers of the District of Columbia and the then Commissioners of the said District by recovering against them judgment for the amount so unlawfully paid by them for said building.

A broad and sound view taken of the two acts of 1902 and 1903 will make it totally unnecessary to follow the devious course of an ingenious argument based upon a fatal misconstruction of the two acts referred to, as to the purpose for which the building was erected, and it is earnestly contended by the plaintiff that in so far as the inherent power may have been exceeded (which is not admitted, but the contrary is asserted) such power was by necessary implication supplied by the acts of 1902 and 1903 when read together; even if therefore the Commissioners are not the District of Columbia, they are the visible agents of the invisible corporate entity known as the District of Columbia.

Suppose it to be true that in general a contract to bind the District of Columbia must be *recorded in a certain book* and executed with certain formalities, can not the creator enlarge from time to time the powers of its agents or dispense with record formalities altogether, and is not this done by the acts of 1902 and 1903, and is not the supervision of the Secretary of the Treasury a sufficient reason for such omission and modification. The plaintiff contends that not only had the District of Columbia inherent power to erect a building for a home, but it had express legislative power to do so, the acts of 1902 and 1903 containing such power.

The Bailey case (171 U. S., 176), relied on by defendant in the court below, was without a hint of legislative authority in the District Commissioners to submit the subject-matter of a pending suit to arbitration.

In this case both inherently, because of the purpose, and by express legislative authority, power to contract on behalf of the District of Columbia was conferred by the acts of 1902 and 1903, taken together.

At this point it is confidently asserted that if this legislation can be fairly so construed as to dispense with a mere general form (such as recording the contract in a book) and thus an honest result as against a dishonest one can be reached, the court will refuse to adopt the dishonest construction, and it is the duty of the judicial department of the Government to assume that the intention of the legislative department is to be honest, for it will be a very grave discourtesy to say that the legislation was framed with the deliberate intent to put it in the power of the District of Columbia to say:

> "True it is I have your building and true it is the acts of 1902 and 1903 as read by plain men clearly or at least fairly enact that I am to pay whether the contract be recorded in a book or not, but 27 years ago certain general language was used in an act known as the Organic Act; you never heard of it; and if you had known of it you would have insisted upon compliance with its requirements, and I would have complied; but now I have a right according to that ancient, and unknown to you, legislation to take and to keep the beautiful building you built for me, and I will not pay you for it because I purposely omitted to record in a book the solemn agreement *you* have fully performed, and for the performance of which I will not pay you, not because I *ought* not, but because *I will not.*"

**The District of Columbia is Estopped to Say that the Contract for Its New Municipal Building is Ultra Vires.**

Where a municipal corporation has power to act or contract it may estop itself by its conduct, silence, or acquiescence, as a natural person may.

Randolph Co. *vs.* Post, 93 U. S., 502.

A municipal corporation, as well as a private individual, may become bound by its ratification of a contract irregularly made without authority by the officers or agents of the corporation.

Hall *vs.* Indianapolis, 92 Fed. Rep., 467.

The erection and furnishing of buildings for the purpose of providing suitable accommodations for the transaction of the business of the municipality is, as a general rule, a necessary incident to the administration of every municipal government.

People *vs.* Menomy, 4 Cal., 9.
Greeley *vs.* People, 60 Ill., 19.
Richmond & Co. *vs.* West Point, 94 Va., 668.

If a municipal corporation permits its officials or agents to act in its name and for its benefit, good faith and honesty require that it prevent the doing of these acts and that it should not deceive the public by allowing them to trust in the unauthorized acts of its agent.

Abbott, Munic. Corp., p. 625, and cases cited.

In Railway Co. *vs.* McCarthy (96 U. S., 258), which was an action against the Ohio and Mississippi Railway Co., to recover damages on account of delay in the execu-

tion of a contract for shipping cattle, the doctrine of *ultra vires* was invoked. But the court in disposing of the point, at page 267, said:

> "The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong;" citing—
>
> Union Water Co. *vs.* Murphy's Flat Fluming Co., 22 Cal., 620.
>
> Morris R. R. Co. *vs.* R. R. Co., 29 N. J. Eq., 542.
>
> Whitney Arms Co. *vs.* Barlow et al., 63 N. Y., 62.

In conclusion it is submitted that the attempted construction of the legislation in question is not in harmony with the logical results of such a construction.

There can be no question as to power in any view, because either under such inherent or legislative power the defendant is bound, and is fully and amply responsible under its contract and obligation, because there stands, and will stand forever, a beautiful monument to be seen and read by all men showing the business methods of the plaintiff, and that he has done all and more than he agreed to do.

By its demurrer the defendant admits that the contract has not been fulfilled, and that damages to the amount of $15,000 was suffered by the plaintiff, but it says that does not concern me.

> "You can not sue in the Court of Claims for the *District* can not be sued there; you can not sue the *individuals* composing the so-called Municipal Building Commission, for they are *agents* of the District of Columbia; you can not sue the *United States* in the Supreme Court of the District of Columbia."

Now let us try the technical view by this fair one. The obtention for the District of Columbia of a permanent municipal building and home so that it might no longer be a wanderer on the face of the earth, subject to the avarice of any landlord, was the central idea of the whole legislation.

To this was added the subsidiary thought that in this, as in all cases, the United States was to bear one-half of the cost; it should be represented in the supervision of the project.

The legislation shows (the court reading the two acts together) this to have been the real purpose.

So that the Secretary of the Treasury and the Commissioners of the District of Columbia (styling themselves "The Municipal Building Commission") were to be the *agents* in the last analysis of the District of Columbia as the *entity*, and they were also agents for the United States in supervising the work on behalf of so large a contributor to the cost of the project.

Now let us test the question by practical results. If this action results as it ought in a judgment for $15,000 in favor of the plaintiff against the District of Columbia, how will it be paid?

It will be paid precisely as if the contracting party had been the District of Columbia acting under the most express mandate from Congress, and therefore one-half of the cost would have been paid by the District and one-half by the United States.

For these reasons the judgment appealed from should be reversed.

SIDNEY T. THOMAS,
JOHN RIDOUT,
*Attorneys for Appellant.*

# Court of Appeals, District of Columbia.

**APRIL TERM, 1910.**

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## No. 2123.

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JAMES L. PARSONS, APPELLANT,

*vs.*

DISTRICT OF COLUMBIA.

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## BRIEF AND ARGUMENT FOR THE DISTRICT OF COLUMBIA.

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# Court of Appeals, District of Columbia.

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## No. 2123.

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*vs.*

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## BRIEF AND ARGUMENT FOR THE DISTRICT OF COLUMBIA.

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### STATEMENT OF THE CASE.

The plaintiff sues the District of Columbia in an action of assumpsit for breach of contract dated July 29, 1905, between the plaintiff and the Secretary of the Treasury and the Commissioners of the District of Columbia acting jointly as the Municipal Building Commission for and on behalf of the United States and the District of Columbia under an act of Congress approved June 6, 1902, entitled "An act to increase the limit of costs of certain buildings; to authorize the purchase of sites for public buildings; to authorize the erection and completion of public buildings, and for other purposes." The consideration for the contract is stated to have been $854,300, for which sum the plaintiff agreed to

furnish all the labor and materials, except the foundation, which had already been put in, and the face or cut stone which was to be furnished, or caused to be furnished, by the said building commission in and about the erection and final completion on or before November 1, 1907, of a building for the use and accommodation of the municipal offices of the District of Columbia. The declaration alleges that the lot or square on which the building was to be erected belonged to the District of Columbia, and as to which lot the United States had no title or interest, except to see to the application of money appropriated by the Congress of the United States to pay for the erection of said building. The declaration alleges that the said Municipal Building Commission agreed to furnish or cause to be furnished to him all the face or cut stone required for the building within sixteen months from April 12, 1905, and it states the time fixed for the delivery of the said stone. The breach of contract, which is the basis of the suit, is that the said building commission failed and neglected to furnish or cause to be furnished the face or cut stone required for the aforesaid building within the time stipulated in said contract, whereby the plaintiff was delayed in the execution of his work for the period of twelve months and subjected to extra expenses, as set forth in bill of particulars filed with the declaration, and he claims fifteen thousand dollars damages from the District of Columbia. To this declaration the defendant has demurred, among other reasons, because there is no authority in law for the District of Columbia to enter into any such contract either alone or in conjunction with the United States, and if the contract be such a one it is void in law. The act of Congress of June 6, 1902, on which the declaration is based, is contained in the general appropriation act relating to the appropriations for construction of the various public buildings throughout the United States. That act states:

"SEC. 6. That the Secretary of the Treasury be, and he is hereby, authorized and directed to acquire by purchase, condemnation, or otherwise, for a sum not exceeding five hundred and fifty thousand dollars for the joint use of the United States and the District of Columbia for the erection thereon of a municipal building for said District, square two hundred and fifty-five in the city of Washington, District of Columbia, and that portion of E street lying between said square and Pennsylvania avenue is hereby appropriated and made a part of said square for the purpose of erecting thereon the municipal building and the Commissioners of the District of Columbia are hereby authorized to change the route of the Washington, Alexandria and Mount Vernon Electric Railway in such a manner as to cause said portion of E street to be vacated by the tracks of said company and jurisdiction is hereby conferred upon the Supreme Court of the District of Columbia upon petition of said company to inquire into, hear, and determine, the amount of the actual cost and expense to the company for the removal of its tracks from E street by reason of the provisions herein contained, and to enter judgment against the United States and the District of Columbia jointly, in such sum as may be so ascertained as aforesaid, and either party shall have the right of appeal from such judgment as in other cases: *Provided,* That if the Secretary of the Treasury shall be compelled or obliged to institute condemnation proceedings in order to acquire said site, such proceedings shall be in accordance with the provisions of the act of Congress approved August thirteenth, eighteen hundred and ninety, providing a site for the enlargement of the Government Printing Office. (United States Statutes at Large, Volume twenty-six, chapter eight hundred and thirty-seven.)

"When the Secretary of the Treasury shall have completed the purchase of said site he and the Commissioners of the District of Columbia, acting jointly, shall proceed at once to contract for the erection and completion thereon of a fire-proof building for the accommodation of the municipal and other offices of the District of Columbia, the total cost of said

building, including cost of site, not to exceed one million five hundred thousand dollars, one-half of which shall be chargeable to the revenue of the District of Columbia and the other half to be paid out of any money in the Treasury of the United States not otherwise appropriated.

"The supervision of the construction of said building may be placed in charge of an officer of the Government specially qualified for the duty, to be appointed by the President of the United States, and who shall receive for his additional services an increase of twenty-five per centum in his salary, to be paid out of the appropriation for said building."

32 Statutes, pt. I, p. 321.

The above act was amended by the act approved March 3, 1903, entitled "An act to increase the limit and cost of certain public buildings, to authorize the purchase of sites for public buildings, to authorize the erection and completion of public buildings, and for other purposes," as follows:

"Municipal building, Washington, District of Columbia, from one million five hundred thousand dollars to two million dollars, one-half of which shall be chargeable to the revenue of the District of Columbia and the other half to be paid out of any money in the Treasury of the United States not otherwise appropriated, and the title to the site heretofore acquired for said municipal building is hereby transferred from the Government of the United States to the District of Columbia: *Provided*, That nothing in this section contained shall be held to repeal or modify the provisions of 'An act to increase the limit of cost of certain public buildings, to authorize the purchase of sites for public buildings, to authorize the erection and completion of public buildings, and for other purposes,' approved June sixth, nineteen hundred and two, so far as the said act provides that the Secretary of the Treasury and the Commissioners of the District of Columbia shall act jointly in contracting for erecting and completing a building for the accommodation of the municipal and other offices in the District of Columbia."

32 Statutes, pt. I, p. 1206.

It thus appears that the buildings are to be erected "for the joint use of the United States and the District of Columbia" and that the title of the land was originally vested in the United States and, before the contract mentioned was entered into, the title was transferred "from the Government of the United States to the District of Columbia," but with the express proviso that the latter act should not be held to repeal or modify the provisions of the former act so far as it "provides that the Secretary of the Treasury and the Commissioners of the District of Columbia shall act jointly in contracting for erecting and completing the building for the accommodation of the municipal and other offices in the District of Columbia."

## ARGUMENT.

### I.

*The municipal corporation known as the District of Columbia and its officers, the Commissioners of the District of Columbia, have no authority to enter into a contract to acquire title to the land or to erect a public building thereon.*

Certain legal principles locally applicable to this jurisdiction show the limited powers of the municipality known as the District of Columbia and of its officers, the Commissioners of the District of Columbia.

First, there are certain powers reposed in Congress by virtue of the constitutional provision in reference to the District of Columbia which it cannot delegate to the municipal corporation, but which must be exercised by direct legislative acts of the Congress of the United States.

> "Congress has express power 'to exercise exclusive legislation in all cases whatsoever' over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where

> legislation is possible. But as a repository of the United States, Congress, in creating the District of Columbia 'a body corporate for municipal purposes,' could only authorize it to exercise municipal powers; and this is all that Congress attempted to do."
>
> Stoutenburgh *v.* Hennick, 129 U. S., 141

Second, the Commissioners are not the municipality, nor has Congress vested in the present municipality the full powers of a municipal corporation. The grant of power is limited. The Supreme Court of the United States has said:

> "The sum of the municipal powers of the District of Columbia are neither vested in nor exercised by the District Commissioners. They are, on the contrary, vested in the Congress of the United States, acting *pro hac vice* as the legislative body of the District and the Commissioners of the District discharge the functions of administrative officials."
>
> District of Columbia *v.* Bailey, 171 U. S., 176.

The District of Columbia has no legislative power.

Kerr *v.* Ross, 5 App. D. C., 241;
Daly *v.* Macfarland, 28 App. D. C., 552.

Under the act of February 21, 1871 (16 Statutes, 419), the District of Columbia as therein constituted had broad municipal powers. The act provided:

> "That all that part of the territory of the United States included within the limits of the District of Columbia, be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate, for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act."

And the act further provided—

> "that the legislative power of the District shall extend to all rightful subjects of legislation within said District consistent with the Constitution of the United States and the provisions of this act, subject nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States."

This act, however, also provided that the legislative assembly shall never "authorize the payment of any claim, or part thereof, hereafter created against the District under any contract or agreement made, without express authority of law, and all such unauthorized agreements or contracts shall be null and void," and it also provided, "all contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the Secretary of the District; and the said board of public works shall have no power to make contracts to bind said District to the payment of any sum of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

The Supreme Court has said these last two quoted sections are deemed to be applicable to the present Commissioners.

District of Columbia *v.* Bailey, 171 U. S., 175.

The powers of this municipal corporation were limited by the act approved June 20, 1874 (18 Stats., 116), which repeals "all provisions of law providing for the executive, for the secretary for the District, for the legislative assembly, for the board of public works, and for the delegate in Congress for the District of Columbia," and established a temporary form of government by a commission consisting of three persons.

The act of June 11, 1878, created a permanent form of government for the District and continued the District as a

municipal corporation with a further limitation of power. Section three of that act expressly states that "Said Commissioners, in the exercise of such duties, powers, and authorities, shall make no contract nor incur any obligation other than such contract or obligations as are hereinafter provided for and shall be approved by Congress." The contracts, "hereinafter provided for," are enumerated in section five of the act and refer to repair of streets, avenues, alleys, or sewers, new pavements, and new streets or sewers. And it says: "All contracts for the construction, improvement, alteration, or repairs of the streets, avenues, highways, alleys, gutters, sewers, and all work of like nature, shall be made and entered into only by and with the official unanimous consent of the Commissioners of the District, and all contracts shall be copied into a book kept for that purpose and be signed by the said Commissioners, and no contract involving an expenditure of more than one hundred dollars shall be valid until recorded and signed as aforesaid." It is said in District of Columbia *v.* Bailey (*supra*), pages 176-178: "But the mere fact that the District is a municipal corporation is not decisive of the question whether or not the Commissioners of the District had power to make a contract to submit to an award, for, as we have seen, it is not the mere existence of municipal corporate being from which the power to make a submission to arbitration is deduced, but that the municipal corporation by which such an agreement is entered into has power to contract, to settle and adjust debts; in other words all the general attributes, which normally attach to and result from municipal corporate existence. Recurring to the statutes relating to the Commissioners of the District of Columbia, it is clear from their face that these officers are without general power to contract debts, or to adjust and pay the same; that, on the contrary, the statutes expressly deprive them of such power, and limit the scope of their authority to the mere execution of contracts previously sanctioned by Congress or which they are authorized to make

*by express statutory authority.* The necessary operation of these provisions of the statutes is to cause the District Commissioners to be *merely administrative officers with ministerial powers only.* * * * By the express terms of the statute the Commissioners are forbidden to enter into any contract binding the District for the payment of any sum of money in excess of $100, unless the same is reduced to writing and is recorded in a book to be kept for that purpose, and signed by all the Commissioners, the statute declaring, in express terms, that no contract shall be valid unless recorded as aforesaid. This mandatory provision of the statute clearly makes the *form* in which a contract is embodied of the *essence of the contract.* In other words, by virtue of the restrictions and inhibitions of the statute, a contract calling for an expenditure in excess of $100 cannot take effect unless made in the form stated. The form, therefore, becomes a matter of fundamental right, and illustrates the application of the maxim *forma dat esse rei.*"

District of Columbia *v.* Bailey, 171 U. S., 161, 176.

## II.

*The District of Columbia being a municipal corporation of limited powers and the Commissioners not being the municipality, but being mere administrative agents of the municipality, in the absence of express statutory or necessarily implied indispensable authority, it is clear that the District of Columbia could not contract to erect the municipal building.*

The power to erect a municipal building has not been given to the District of Columbia, either in express words or by necessary implication, nor was the erection of the building indispensable for the purposes of the corporation.

"The next proposition is equally well established, namely, that '*a municipal corporation possesses and can exercise the following powers, and no others:* First, those granted in

*express words;* second, those *necessarily or fairly implied* in or *incident to* the powers expressly granted: third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' "

28 App. cases D. C., p. 558, United States ex rel. Daly *v.* Macfarland.

It is not pretended that the terms of the law necessary to make a contract binding on the District of Columbia have been observed. The Commissioners, as the agents of the District of Columbia, could not enter into the contract, nor is it alleged that it received their official unanimous consent or that it was or is recorded in a book, as required by law. It is true the declaration alleges that the contract was entered into for and on behalf of the United States and the District of Columbia, but the Commissioners of the District as such had no authority to enter into any such contract.

The law must be examined to ascertain the extent of their authority. It has been said by the Court of Appeals:

> "It further appears that said act imposed certain limitations upon the Commissioners, and these limitations are equally binding upon the school trustees appointed by the Commissioners. As it is stated in appellant's brief that the court below relied upon the section containing these limitations, we deem it best to set forth the material part of the section:
>
> " 'And the Commissioners of the District of Columbia shall have power, subject to the limitations and provisions herein contained, to apply the taxes or other revenues of said District to the payment of the current expenses thereof, to the support of the public schools, the fire department and the police, and for that purpose shall take possession and supervision of all the offices, books, papers, records, moneys, credits,

securities, assets, and accounts belonging or appertaining to the business or interest of the government of the District of Columbia and exercise the duties, power, and authority aforesaid; but said Commissioners, in the exercise of such duties, powers, and authority, shall make no contract nor incur any obligation other than such contracts and obligations as are hereinafter provided for and shall be approved by Congress.'"

20 Stat. at L., 103, chap. 180.

"In the face of this prohibition, neither the Commissioners, nor the school trustees acting for them, could justify the appointment of appellant as assistant engineer and night janitor, and bind the District to his payment, unless authority therefor be found in the said act or be approved by Congress."

25 App. Cases D. C., pp. 135, 136, Myers *v.* District of Columbia.

It is fundamental that every one dealing with a public agent is bound to know the extent of the authority of such agent.

## III.

*Congress has by special act created the agency to enter into the contract to erect the municipal building, and it has not imposed that duty on the District of Columbia.*

*If Congress had imposed the duty of erecting the building on the Commissioners of the District of Columbia alone it would not have followed that the duty was imposed on that municipality.*

It is well known that in reference to streets the board of public works, as a part of the municipality, had, and the Commissioners now have as its successors, "entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city, and all other works which may be intrusted to their charge by the legislative assembly or Congress" (Sec.

37, Act Feb. 21, 1871), yet acts thereunder may either be as the agent of Congress or as the agent of the District.

This is the express doctrine of Barnes *v.* District of Columbia.

In that case after referring to the above in part quoted section, the Supreme Court said:

> "It is to be noticed here, that the municipal corporation, as represented by the legislative assembly, may impose upon this board such other duties as they think proper. The board is to perform 'all other work intrusted to their charge by the legislative assembly or Congress.
>
> "In this respect, certainly, it is not an independent body. It is subject to two masters, either of whom may impose upon it any other work it may choose, and which work it is bound to perform. Its dependence upon Congress and upon the legislative assembly in this respect rests upon the same basis. It will not be claimed by any one that it is not subject to the control of Congress, and dependent upon that body.
>
> "The board shall disburse all moneys appropriated by the United States or the District of Columbia, or collected from property holders, for improvements of streets or alleys. *In doing the two acts here specified, the board again acts as the hand and agent of the United States or of the District, as the case may be.*"
>
> Barnes *v.* District of Columbia, 91 U. S., 550.

As above pointed out it is inherent in the constitution of the local municipality that its executive officers are dual agents acting sometimes for the United States as governmental agents and at other times as agents of the municipal corporation, and this distinction, as will be hereafter shown, has been observed in various acts of Congress, and recognized by the courts.

The same principle is stated by Mr. Dillon in his work on Municipal Corporations.

> "The corporation is the artificial body created by the law, and not the officers, since these are, from the

lowest up to the councilmen or mayor, the mere ministers of the corporation. Even the council, or other legislative or governing body, constitutes, as it has been well remarked, neither the corporation, nor in themselves a corporation." * * *

"The primary and fundamental idea of a municipal corporation is an agency to regulate and administer the internal concerns of a defined locality in matters peculiar to the place incorporated, or in all events not common to the State or people at large; but it is the constant practice of the States to make use of the incorporated instrumentality, or of its officers, to exercise powers, perform duties, and execute functions not strictly or properly local or municipal in their nature, but which are, in fact, State powers, exercised by local officers, within defined territorial limits; and it is important, as we shall hereafter see, to keep this distinction in mind. In theory, the two classes of power are distinct; but the line which separates the one from the other is often very difficult to trace. The point may be illustrated from the English law: If the king incorporate a town, its officers will have no implied power as conservators or justices of the peace; express words are necessary to confer this power, and when they act in the latter capacity, it is not because they are corporate officers, but because of powers expressly annexed to their corporate offices; and the two capacities remain distinct, although united in the same person."

1 Dillon's Municipal Corporations (3rd Ed.), pp. 28-29.

## IV.

*Congress has not, however, referred the erection of the municipal building to the District of Columbia by virtue of its right to impose superadded duties on the executive officers alone, but has exercised its right to directly appoint a joint Commission to erect the municipal building on land to be acquired by the Federal Government, through its agent, the Secretary of the Treasury.*

It is first to be observed that the District of Columbia in-

curs no liability for the erection of buildings or obstructions on property under Federal control.

> "The Government reservations throughout the District of Columbia are therefore in the exclusive charge and control of the Federal Government; and the municipality cannot be made to respond in damages for an injury such as happened to the appellee, if it occurred because of the neglect or omission of the Federal Government. It is no sufficient answer to say that the Federal Government heretofore permitted one Early to erect the structure described in the record; for, while it is true the Chief of Engineers and Secretary of War permitted the erection of this structure, they were careful to observe that it did not encroach upon this reservation.
>
> "Because the court did not plainly instruct the jury that, if the stake in question was found to have been located upon the Government reservation in question, the appellant had no control over its location, and no liability for any negligence happening upon such reservation, and their verdict should, therefore, be for the defendant, the court erred."

The court said this, although the stake was so near the sidewalk that pedestrians using the sidewalk were liable to injury.

> 30 App. Cases, D. C., pp. 145-146. District of Columbia *v.* Coale.

Under the title of "An act authorizing the establishing of a public park in the District of Columbia," an act of Congress was approved on September 27, 1890, 26 Stat., 492, which provided that the Chief of Engineers of the United States Army, the *Engineer Commissioner of the District of Columbia*, and three citizens to be appointed by the President, by and with the advice and consent of the Senate, be created *a commission* to select the land for said park. The act finally provided that the public park authorized and established thereby should be *under the joint control of the*

*Commissioners of the District of Columbia and the Chief of Engineers of the United States Army,* and it was made their duty, as soon as practicable, to render the park fit for the purposes of its establishment, and to make and publish such regulations as they deemed necessary or proper for the care and management of the same. It was objected that the act was unconstitutional and invalid, among other reasons, because two of the members were appointed by Congress, and not by any executive officer or court. In passing on this objection the Supreme Court observed:

> "Proceeding upon the conclusion that the United States possess full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia, we come to a consideration of certain objections, taken in the court below and urged here, to the validity of the statute itself and to the proceedings under it.
>
> "There are several features that are pointed to as invalidating the act. The first is found in the provision appointing two members of the park commission, and the argument is, that while Congress may create an office, it cannot appoint the officer; that the officer can only be appointed by the President with the approval of the Senate, and that the act itself defines these park commissioners to be public officers, because it prescribes that three of them are to be civilians, to be nominated by the President and confirmed by the Senate. This, it is said, is equivalent to a declaration by Congress that the three so sent to the Senate are 'officers' because the Constitution provides only for the nomination of 'officers' to be sent to the Senate for confirmation; and that it hence follows that the other two are likewise 'officers,' whose appointment should have been made by the President, and confirmed by the Senate. As, however, the two persons whose eligibility is questioned were at the time of the passage of the act and of their action under it officers of the United States who had been theretofore appointed by the President and confirmed by the Senate, we do not think that, because additional duties germane to the offices already held by

> them were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the powers and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.
>
> "It is true that it may be sometimes difficult to say whether a given duty, devolved by statute upon a named officer, has regard to the civil or military service of the United States. Wales *v.* Whitney, 114 U. S., 564, 569 (29: 277, 278); Smith *v.* Whiting, 116 U. S., 167, 179, 181 (29: 601, 605). But in the present case the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to or outside of the sphere of their official duties."
>
> Shoemaker *v.* United States, 147 U. S., pp. 282-300.

In addition to special duties which Congress is authorized to assign to officers such as the District Commissioners, there are certain other duties of the municipality acting through its agents for which there is no liability. These duties are commonly known as Governmental duties as distinguished from municipal duties. It is not necessary to argue in this case that the erection of the municipal building in view of the limited powers of the District of Columbia, is a Governmental duty, although, it is submitted, it would not be inappropriate to do so.

An instance of non-liability for maintenance of a fire-engine house as a Governmental duty is Brown *v.* District of Columbia, 29 App. D. C., 273.

## V.

*When Congress has by direct appointment of officers or by imposing superadded duties on the Commissioners of the District of Columbia undertaken management of matters concerning the District of Columbia, such duties are not municipal duties, and no authority is given the municipality and it is not liable for anything done by such agents.*

The various street railway charters contain superadded duties imposed on the Commissioners too numerous to be cited.

Besides the superadded obligations and duties imposed upon the Commissioners by the various acts dealing with street railways and the bathing beach, Congress has imposed upon the Commissioners many other duties not strictly municipal, among which are the following, viz:

Section 190 of the Code, authorizing the appointment of Coroner, whose duties are in no sense municipal, but deal with the question of whether crime has been committed.

Section 717 of the Code, giving the Commissioners discretion to grant or refuse charter of incorporation for trust, loan, mortgage, &c., corporations.

Commissioners and Chief of Engineers of United States Army constituted Board of Control of Rock Creek Park (26 Stats., 492; 28 Stats., 252; 31 Stats., 573).

In the act of March 3, 1899 (30 Stats., 1377), the Commissioners are given exclusive control of wharf property, within certain lines, whether belonging to the United States or the District of Columbia, and are authorized, acting with the Chief of Engineers of the United States Army, to make rules and regulations for the proper care of said property.

And the Commissioners and the said Chief Engineer, subject to the approval of the Secretary of War, are authorized to fix harbor lines.

One Commissioner trustee of Columbia Hospital (21 Stats., 157).

One Commissioner a trustee of Reform School (21 Stats., 156).

To fill vacancies in trustees Columbia Hospital (27 Stats., 551).

Appoint dental examiners (27 Stats., 42).

To appoint Board of Medical Supervisors and Boards of Medical Examiners (29 Stats., 191).

To make regulations to prevent spread of contagious diseases in cattle and report to Secretary of Agriculture (23 Stats., 33).

It has been expressly decided by the Court of Appeals that when superadded duties are imposed on the Commissioners of the District of Columbia the municipality is not in any way bound thereby and the Statutes in the particular cases where the municipality was exonerated from liability afforded less legal excuse for such determination than the statute involved in this case.

In McGraw *v.* District of Columbia (3 App., D. C., 405) an act of Congress, approved May 26, 1890, was involved. That act is entitled "An act establishing a free public bathing beach on the Potomac River near Washington Monument;" it was provided as follows:

> "Be it enacted, etc., that the Commissioners of the District of Columbia are hereby authorized and permitted to construct a beach and dressing houses upon the east shore of the tidal reservoir against the Washington Monument grounds, and to maintain the same for the purpose of free public bathing, under such regulations as they shall deem to be for the public welfare; and the Secretary of War is requested to permit such use of the public domain as may be required to accomplish the objects above set forth.
>
> "SEC. 2. That the sum of three thousand dollars is hereby appropriated from the revenues of the District of Columbia to be immediately available for the purposes of this act."
>
> 26 Stats., 490.

Before the bathing beach was thrown open to the public the plaintiff's intestate was drowned while swimming there, and suit was brought against the District of Columbia for damages resulting from the death of the boy. In disposing of this case the court said:

> "It may well be doubted whether the act of Congress that has been cited in this case was intended to impose any duty upon the District of Columbia, such as is sought to be enforced in the present suit. The act is permissive in its character, and not mandatory. It is not mandatory either upon the Secretary of War to permit the use of the public grounds for the purpose in question, or upon the Commissioners of the District of Columbia to carry the purpose into effect. *And even if it should be assumed that there was a duty imposed by it, from which a liability might accrue, it is not at all clear that the District of Columbia is chargeable with that duty, which was laid by express terms, not on the District as a municipality, but upon the Commissioners of the District as a superadded obligation.*"
>
> McGraw *v.* District of Columbia, 3 App., D. C., 405, 408.

This doctrine was approved in the subsequent case now cited. A passenger on a street railway car of the Great Falls and Tennallytown Railway Company, whose elbow was struck by a passing car, was thereby thrown to the ground and killed, and an action was brought by his administrator against the District of Columbia, in which it was charged that the District was liable on the ground that the Commissioners of the District were charged by the acts of Congress of August 10, 1888 (25 Stats., 446), and March 24, 1890 (26 Stats., 29), incorporating and amending the charter of that company, with the duty of approving and supervising the construction of the company's tracks, and the testimony showed that the accident resulted from the large size of the cars and the closeness of the tracks.

"The act of Congress approved August 10, 1888 (25 Stats., 446), under which the street railway company was incorporated, authorized it 'to construct and lay down a single or a double track railway, with necessary switches, turn-outs, and other mechanical devices for operating the same by cable or electric power, for carying passengers in the District of Columbia from the Potomac River near High street, to and along High street, in Georgetown, to the Tennallytown road, but wholly outside the limits of said road; and along the side of the said road to the District line; also the privilege of laying such conduits beneath the surface of Water street for the purpose of conveying or communicating power from any suitable point along said Water street to said High street, as may be found necessary, and subject to the approval of the Commissioners of the District of Columbia; * * * said railway shall be constructed of good materials and in a substantial manner with rails of the most approved pattern, the gauge to correspond with that of other city railroads, all to be approved by the Commissioners of the District of Columbia; * * * it shall also be lawful for said corporation, its successors or assigns, to erect and maintain at such convenient and suitable points along the line as may seem most desirable to the board of directors of said corporation and subject to the approval of the Commissioners of the District, an engine house or houses, boiler house, and other buildings necessary for the successful operation of such cable or electric road. * * * The said company shall place first-class cars on said railway, with all modern improvements, for the convenience and comfort of passengers, and shall run cars thereon as often as the public convenience may require, and in accordance to a published schedule to be filed with the District Commissioners and be approved by them. * * * Said company shall have at all times the free and uninterrupted use of the railway.'"

And by act of Congress, approved March 24, 1890 (26 Stats., 29), the charter of this railway company was amended, by substituting after the words "and along High street, in

Georgetown, to the Tennallytown road," the words "and thence along and in said roads" for the words "but wholly outside of the limits of said road and along the side of said way." *Provided,* that the inner line of rails shall be at the minimum distance of 8 feet from the center of the improved roadway. *And provided further,* That said railway shall be located on such side of the roadway as may be indicated by the Commissioners of the District of Columbia. The court said:

> "It will be noted that this grant of the railway company was not a municipal, but a private congressional grant. The municipality had no voice in granting the privilege thereby conferred upon the railway company, and was equally impotent to restrain or terminate their enjoyment. No express duty was thereby imposed upon the municipality, and certainly none can be implied. *Congress, having sole power to bestow this grant, had like power to nominate its own agents, subject to whose approval said railway was to be constructed.* And therefore it was that Congress designated the Commissioners of the District of Columbia as such agent, charged, not with a duty that was mandatory, but with one that involved the exercise of judgment and discretion. It was plainly not a ministerial but a judicial function imposed upon the Commissioners as individuals, and not as the official representatives and agents of the municipality."
> * * * "Congress has repeatedly conferred similar authority upon other Federal officials in respect of private grants of franchises in the District of Columbia. For instance, Congress provided that the construction of the Washington and Georgetown Railroad, the Columbia Railroad, and the Metropolitan Railroad, should in each case be approved by the Secretary of the Interior. Again, in 1892 the Metropolitan Railroad was required to repair its bridge across Rock Creek in accordance with plans and specifications prepared by the Engineer Commissioner of the District of Columbia and under his direction.
>
> "*Since it is manifest that no municipal obligation was created by the acts of Congress just referred to, in*

*which the Secretary of the Interior and the Engineer Commissioner were, respectively, designated agents of Congress in supervising and approving the construction of the railways and bridge work therein provided for, upon what principle can it be said that the case at bar is differentiated from those just cited on the grounds that the agents designated by Congress in the act under consideration chance to be the Commissioners of the District of Columbia? It is manifest from the language of the acts of Congress already quoted that the authority therein given was not to the municipality, but rather a superadded obligation laid upon the Commissioners as the chosen agents or representatives of Congress.*

"In McGraw *v.* District of Columbia, 3 App. D. C., 408, 25 L. R. A., 691, this court said: 'And even if it should be assumed that there was a duty imposed by it (the act of Congress) from which a liability might accrue, it is not at all clear that the District of Columbia is chargeable with that duty which was laid by express terms, not on the District as a municipality, but upon the Commissioners of the District as a superadded obligation.'

"Again, in the case of District of Columbia *v.* Moulton, 15 App. D. C., 374, the court said: 'In a doubtful case the recovery ought not to pass against the municipality. It is only where there is a plain and obvious neglect of duty on the part of the municipal agents that liability can arise in such a case as the present.'"

Smith *v.* District of Columbia, 25 App. D. C., 375-376.

It has been heretofore noted that the *official* unanimous consent of the Commissioners manifested in a particular manner is a prerequisite to liability on part of the District of Columbia (District of Columbia *v.* Bailey, 171 U. S., 161). This *official* consent does not mean the consent of the Commissioners separately, neither does it mean the consent of the Commissioners *acting jointly* with the Secretary of the Treasury. Such separate or joint consent would in neither instance be the *official* unanimous consent of the Commis-

sioners acting as a board on behalf of the District of Columbia, and would in each instance be unavailing to bind the District. In Fay *v.* Macfarland it appeared that the three Commissioners had signed and filed a petition for condemnation of land for the extension and continuation of an alley, but no evidence was introduced by them to show that they deemed the public interests required the extension of the alley. The court said:

> "*The mere signing of the* petition DOES NOT PURPORT SUCH UNITED CONSIDERATION AND CONFERENCE TOGETHER upon the subject as is necessary to authorize an *official* declaration that the public interests demand the taking of private property for public use. * * * *The Commissioners are creatures of statute. They possess no implied powers. Their authority to act must be gathered from the express terms of the law granting authority, they must comply literally with its requirements.*"
>
> Fay *v.* Macfarland, 32 App. D. C., 295, 299.

The fact that Congress by the act of March 3, 1903 (32 Statutes, pt. I, p. 1206), declared that "the title to the site heretofore acquired for said municipal building is hereby transferred to the District of Columbia," particularly when the proviso which immediately follows that declaration is considered, does not affect the question. Congress had the undoubted right to transfer the title to the District, but it did not either in the original or amended act make the contract a contract of the District of Columbia in express language or otherwise. The contract remained to be entered into as it was by the agents appointed by Congress to act for the United States. Congress did not require the *official* action of the Commissioners as such, but carefully refrained from permitting such *official* action. The Commissioners of the District of Columbia had no authority as agents of the District of Columbia to pursue the methods pointed out by law necessary to be followed by them in making contracts for the District, and in fact no such action was taken. Whether

the fact can be considered is of no moment, because the law implies that they did their duty, which was not to enter into a contract recorded in the book. "A fact impossible in law cannot be admitted by demurrer" (Moore *v.* Miller, 5 App. D. C., 413, 425, 426). Further, the money has been paid and this suit is not for money *appropriated* by Congress but for breach of an alleged contract for which no money has been appropriated for expenditure by the District of Columbia or by the United States. It follows that the missioners should contract on behalf of the District of Columbia, and neither can the United States be sued. In District of Columbia cannot be sued, no matter if the Com- Metropolitan Railroad Company *v.* District of Columbia the Supreme Court said:

> "The *counsel* of the plaintiff *contend that the government of the District of Columbia is a department of the United States Government,* and that the corporation is a mere name, and not a person in the sense of the law, distinct from the government itself. *We cannot assent to this view.* It is contrary to the express language of the statutes. That language is that the District shall 'remain and continue a municipal corporation,' with all rights of action and suits for and against it. If it were a department of the Government how could it be sued? Can the Treasury Department be sued; or any other department?"
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> Metropolitan Railroad Co. *v.* District of Columbia, 132 U. S., 1, 7.

## VI.

*Construction of the Acts of June 6, 1902, and March 3, 1903.*

These acts deal with the erection of public buildings for the United States, and Congress was careful to direct the purchase or condemnation of the land therein and if by condemnation then, under the act providing a site for the en-

largement of the Government Printing Office (26 Stat., ch. 837), Congress, in order that no implication should arise that the land was to be acquired for the District of Columbia, seems to have purposely ignored the provisions of section 483 of the Code of the District of Columbia. That section provides:

> "SEC. 483. LAND FOR UNITED STATES AND DISTRICT OF COLUMBIA.—Whenever land in the District is needed for the use of the United States, or by the Commissioners of the District for sites of school houses, fire or police stations, or for a right of way for sewers, or *for any other municipal use authorized by Congress,* and the same cannot be acquired by purchase from the owners thereof at a price satisfactory to the officers of the Government authorized to negotiate for the same, application may be made to the Supreme Court of the District by petition in the name of the United States or of said Commissioners, as the case may be, for the condemnation of said land or said right of way and the ascertainment of its value."

The officer selected to acquire the site was the Secretary of the Treasury, not the Commissioners of the District of Columbia.

The only liability imposed by the statute is in reference to the removal of railroad tracks from E street and it is provided solely in that case that joint liability on jurisdiction especially conferred is imposed on the United States and the District of Columbia and even that liability was a *street* liability. *"Expressio unius est exclusio alterius."*

The supervision of the construction of the building was placed in charge of an officer of the Government of the United States, and the Secretary of the Treasury, and the Commissioners of the District of Columbia acting jointly were to enter into the contract. A *municipal* building was to be erected "for the *joint use* of the United States and the District of Columbia," and, of course, Congress has still the right

to say to what use the building shall be put, and divest the title of the District to the property. It may organize a new municipal corporation. It was proper that the agents selected to make the contract should be those who were familiar with the necessities of such a building. The agents of the United States were therefore advisedly selected. And when the amendatory act was passed transferring title to the District of Columbia in order that no liability should be imposed on the District of Columbia it was expressly provided, "That nothing in this section contained shall be held to repeal or modify the provisions of 'An act to increase the limit of cost of certain public buildings, to authorize the purchase of sites for public buildings, to authorize the erection and completion of public buildings, and for other purposes,' approved June sixth, nineteen hundred and two, so far as the said act provides that the Secretary of the Treasury and the Commissioners of the District of Columbia shall act jointly in contracting for erecting and completing a building for the accommodation of the municipal and other offices in the District of Columbia."

Application of the principles of law heretofore cited, to these statutes discloses an absence of "express statutory authority" (District of Columbia *v.* Bailey, 171 U. S., 161, 176), or "express words" (U. S. *ex rel.* Daly *v.* Macfarland, 28 App. D. C., 558), or clear language which is necessary in order to impose municipal rights and duties in reference to the contract.

The cases cited heretofore also show conclusively that the duties imposed were superadded duties and not those contemplated by the laws governing the municipal corporation.

## VII.

*The amended declaration cannot create a cause of action because it is based upon statutes which show that no cause of action exists against the District of Columbia.*

The allegation in the amended declaration that the Commissioners of the District of Columbia were in fact acting for and on behalf of the District of Columbia only, although professing to act on behalf of the United States and the District of Columbia, is contrary to the statute mentioned in the declaration, and so is every other allegation charging the contract to have been made by the District of Columbia.

The effect of the statute cannot be charged by a pleading. In Louisville *v.* Nashville R. R. Co. *v.* Palmer, 109 U. S., 252, 253, it is said:

> "It is sought to avoid this conclusion by converting the question into one of pleading. It is said that the bill alleges, as a matter of fact, that the exemption passed to and vested in the complainant below, and that the truth of the allegation is admitted by the demurrer. In Wilson *v.* Gaines, 103 U. S., 417, it was inferred in the face of a demurrer, claimed to be an admission of a contrary allegation, that the sale did not pass any rights of property not described as within the lien of the mortgage."

Nowhere in the act is any authority bestowed upon any one to enter into a contract *for* and *on behalf* of the District of Columbia. Congress had full discretion in the matter and instead of directing that the District of Columbia, as a body corporate, or any person or persons for it, should contract for the erection of a municipal building, they created a building commission of four persons and directed them to contract jointly for the erection of such a building; but immediately, and in the selfsame act, they deprived the building

commission, including the Commissioners of the District of Columbia, of all power to supervise and control the constrnction of the building, by directing that the entire supervision of the construction of said building should "be placed in charge of an officer of the Government specifically qualified for the duty, to be appointed by the President of the United States" (32 Stat. Pt., 1, p. 321). A reading of this statute shows that the District of Columbia as a municipality is not mentioned in the act and no one is empowered thereby to contract for or on behalf of the District. The three gentlemen serving as Commissioners,—two civilians and one officer of the United States Army,—were made members of the commission created by Congress and directed to contract for the erection of a fire-proof building, but their duties ended with the execution of this contract. The building commission was created for a single purpose. Just as soon as it had contracted for the erection of the building, its duties, responsibilities, and authority came to an end. Can the District of Columbia be held bound for the acts of the Secretary of the Treasury and the Commissioners without an act of Congress to that effect? The courts have uniformly held, as a matter of law, that a public officer cannot bind his principal unless *express authority* be given him to that effect.

If the District of Columbia is to be held responsible for the alleged failure of the members of the building commission to comply with the obligations they assume in their contract with the plaintiff, such liability can arise solely by implication or inference based on the fact that the Commissioners of the District be made members of the building commission. The law, however, denies the right or power of the public agent to bind his principal in the absence of express authority to do so.

Counsel for the plaintiff in error claimed in the court below that the District estopped to say that the contract is *ultra vires.*

This claim assumes that the contract was made by the

District of Columbia or for or on behalf of the District of Columbia. It also assumes that the District of Columbia had power to make the contract. It has been shown that the District of Columbia did not make the contract; that it was not made for and on behalf of the District of Columbia, and that it did not have power to make the contract. The legislation providing for the purchase and erection of the municipal building does not contain those powers, and it seems clear that no other source of authority exists by which any liability is imposed on the District of Columbia.

The history of legislation providing for the purchase and erection of a municipal building is as follows: The act of June 6, 1902 (32 Stat., p. 321), directs the Secretary of the Treasury to acquire square 255, in the city of Washington, by purchase, condemnation or otherwise, "for the joint use of the United States and the District of Columbia for the erection thereon of a municipal building for the said District."

When the Secretary of the Treasury had completed the purchase of said site, said act directs that "he and the Commissioners of the District of Columbia, acting jointly, shall proceed at once to contract for the erection and completion thereon of a fire-proof building for the accommodation of the municipal and other offices of the District of Columbia," at a total cost for site and building of $1,500,000.00, one-half to be paid by the District and the other half by the United States. No appropriation was made by this act.

The act of June 28, 1902 (32 Stat., pt. 1, p. 429), appropriates $600,000, "for a municipal building for the joint use of the United States and the District of Columbia."

The act of March 3, 1903 (32 Stat., p. 1206), increased the limit of cost of the land and building to $2,000,000, one-half to be charged to the District and the other half to the Treasury of the United States, and the title to the site is transferred from the United States to the District of Columbia, with the *proviso*, that said act shall not be held to repeal

or modify the provisions of the act of June 6, 1902, *supra*, which provides that the Secretary of the Treasury and the Commissioners of the District shall act jointly in contracting for the erecting and completing of a building for the accommodation of the municipal and other offices in the District of Columbia.

The deficiency appropriation act of March 3, 1903 (32 Stat., pt. 1, p. 368), appropriated $300,000 for continuing work on the municipal building. This act, page 363, provided that one-half of all sums therein appropriated shall be paid out of the funds of the United States and the other half out of the revenues of the District.

The appropriation act of March 3, 1905 (33 Stat., pt. 1, p. 890), appropriated $300,000 for continuing work on the municipal building and increased the total cost from $2,000,000 to $2,500,000. This act, at page 883, provides that one-half of this and all other sums covered by it shall be paid one-half from the United States Treasury and the other half from the revenues of the District.

The District appropriation act of June 27, 1906 (34 Stat., pt. 1, p. 489), appropriates $500,000 for continuing work on the municipal building, and at page 482 this act provides that one-half of all the sums appropriated by it shall be paid from the United States Treasury and the other half from the revenues of the District.

The act of March 2, 1907 (34 Stat., pt. 1, p. 1126), appropriates $550,000 for completing work on the municipal building.

This act, at page 1119, provides that one-half of all sums covered by it shall be paid from the United States Treasury, and the other half from the revenues of the District.

If the court holds that the District officials have entered into the contract without charter power, attention is invited to the following authorities in other jurisdictions which sustain the proposition that it incurred no liability by such unauthorized act of its officers.

Suppose injury resulted to employees or third persons by negligence in the construction of the building would the District have been liable?

There is an interesting annotated case on this subject in 2 L. R. A. (N. S.), 910, where it is held that a municipal corporation is not liable for the death of its employee from injuries inflicted upon him in the performance of an *ultra vires act*. Switzer *vs.* Harrisonburg (Va.), 52 S. E., 174; 2 L. R. A. (N. S.), 910. In Bell *vs.* Kirkland the doctrine of *ultra vires* as applied to municipal corporations is discussed. It is said in the opinion in this case:

> "It is to be kept in mind that the term *ultra vires* is used in many different senses. 8 Words and Phrases, 7145, 7146. Two different uses of the word were pointed out in Minnesota Thresher Mfg. Co. *v.* Langdon, 44 Minn., 37; 46 N. W., 310; three in Bissell *v.* Michigan, S. & N. I. R. Co.'s, 22 N. Y., 258, and four in Green's Brice, *ultra vires,* 33-35. For present purposes, it suffices to refer especially to two different meanings. The first of these describes a contract which is not within the scope of the powers of a corporation to make under any circumstances, or for any purposes; for example: 'Where a corporation authorized only to build a railroad engages in banking.' Mitchell, J., in Minnesota Thresher Co. *v.* Langdon, 44 Minn., 41; 46 H. W., 312. 'Where the legislature, for instance, having authorized you to make a railway, you cannot go and make a harbor.' Kindersley, V. C., in Shrewsbury *v.* North Staffordshire R. Co., 35 L. J. Ch., N. S., 156, 172. So, in the cases to which defendant refers us, it was held to be wholly outside a city's power to 'surrender control over streets' (State *ex rel.* St. Paul *v.* Minnesota Transfer R. Co., 80 Minn., 108; 50 L. R. A., 656; 83 N. W., 32); to pay money to aid in building a shoe factory within its limits (Chaska *v.* Hedman, 53 Minn., 525; 55 N. W., 737); to aid in the construction of a dam for the purpose of improving a private water power (Coates *v.* Cambell, 37 Minn., 498; 35 N. W., 366); to construct a building for the

use of another municipality or other third person (Henderson *v.* Sibley County, 28 Minn., 515; 11 N. W., 91; Glencoe *v.* McLeod County, 40 Minn., 44; 41 N. W., 239); or without authority to buy real estate (Bazille *v.* Ramsey County, 71 Minn., 198; 73 N. W., 846). For further illustrations, see Ingersoll on Public Corporations, 292, 293. The second of these meanings refers to contracts of a class which the corporation had a right to execute, but with respect to which there has been some irregularity or defect in the actual exercise of the power 'in some particular or through some undisclosed circumstance' affecting the individual contract in issue. The former class is *ultra vires* in the primary, and really only proper, use of the term, while in the second, it is merely secondary. Mitchell, J., in Minnesota Thresher Mfg. Co. *v.* Langdon, 44 Minn., 37; 46 N. W., 310. That is to say an *ultra vires* municipal contract, in its true sense, is a contract relating to matters wholly outside the charter powers of a corporation. 2 Dill. Mun. Corp., §§ 935, 936. In Miners' Ditch Co. *v.* Zellerbach, 37 Cal., 543, 578; 99 Am. 'These distinctions must be constantly borne in mind when considering a question arising out of the dealings with a corporation. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto* and the corporation may avail itself of the plea. But, when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case.' And see Valparaiso *v.* Valparaiso City Water Co., 30 Ind. App., 316; 65 N. E., 1063; Rogers *v.* Omaha (Neb.), 107 N. W., 214; 5 Thomp. Corp., §§ 5975-5977; Dill. Mun. Corp., § 936; 2 Current Law, 977."

Bell *v.* Kirkland, 13 L. R. A. (N. S.), 796.

There are numerous cases where contracts have been held void and insufficient, even when executed, to create an estoppel against the city, where they were in violation of express prohibitions, such as those against the creation of in-

debtedness beyond a specified amount. As illustration merely of this class of cases is a decision denying a contractor for the building of a court-house any compensation for extra work where this created an excess of the cost over the amount which the people had voted, and the law allowed such an expense only when it was voted.

King *vs.* Mahaska County, 75 Iowa, 329.

So a contract employing a school teacher who lacked the necessary legal qualifications was held void, and a warrant for the teacher's compensation was held to be without consideration.

Goose River Bank *vs.* Willow Lake School Twp., 1 N. D., 26.

And where contracts are required by statute to be let to the lowest bidder, no compensation can be recovered for extra work or any work done under such a contract which is not so let.

McBrian *vs.* Grand Rapids, 56 Mich., 95.
McDonald *v.* New York, 68 N. Y., 23; 23 Am. Rep., 144.
Parr *v.* Greenbush, 72 N. Y., 463.
Dckinson *v.* Poughkeepsie, 75 N. Y., 65.
Smith *v.* Newburg, 77 N. Y., 136.

The judgment below should be affirmed.

Respectfully submitted,

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